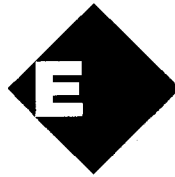




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NEW WEST ENERGY

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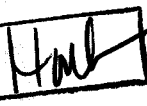
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DOCUMENT CONTROL

Ray T. Williamson
Acting Director, Utilities Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007-2996

Arizona Corporation Commission
DOCKETED

JUL 22 1998

DOCKETED BY 

July 22, 1998

RE: *Comments on the 2nd Draft of Proposed Revisions of the Retail Electric Competition Rules (R14-2-1601 et seq.)*

Dear Mr. Williamson:

New West Energy ("New West") has reviewed the second draft (the "Second Draft") of the proposed revisions of the Retail Electric Competition Rules and respectfully submits the following comments thereto.

The Second Draft does not significantly address the comments and concerns presented in New West's letter of July 6, 1998, in which we responded to the first draft of proposed revisions. Accordingly, we attach hereto and resubmit our July 6 comments in response to the Second Draft. We respectfully request that you reconsider the importance of pro-competitive rules in light of these comments.

Sincerely,



Karen Caldwell
Managing Director



NEW WEST ENERGY

Ray T. Williamson
Acting Director, Utilities Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007-2996

July 6, 1998

RE: *Comments on the 1st Draft of Proposed Revisions of the Retail Electric Competition Rules (R14-2-1601 et seq.)*

Dear Mr. Williamson:

New West Energy ("New West") is a prospective Electric Service Provider in Arizona. New West supports retail electric competition and applauds the Commission's decision to implement competition in Arizona.

The following comments on the proposed revisions of the Retail Electric Competition Rules (the "Rules") reflect the valuable experience that we have obtained as an electric service provider in California. Having already participated in retail electric competition, we are confident that full competition can work in Arizona as well. Accordingly, we urge the Commission to promote full competition in the Rules. The Commission should remove from the draft Rules all provisions that will tend to hinder or delay the transition to a market-driven retail electric industry. Such transition should occur boldly and rapidly, without intrusive or burdensome regulatory procedures that will impede the ability of the industry to function at its full competitive capacity.

We understand that these rules are a first draft and that further comment will be permitted. In this regard New West Energy will continue to develop concepts, both for the rules and working groups, so that Arizona will be attractive to energy providers and so that we might avoid some of the problems which have occurred in California.

We appreciate the opportunity to comment of the proposed revisions to the Rules and look forward to participating in the process of developing a pro-competitive transition to retail electric competition.

Sincerely,

Karen Caldwell
Managing Director

for Karen Caldwell

NEW WEST ENERGY

Comments to Proposed Rule Changes

*In these comments, suggested changes to the text of the Rules are indicated in **bold**. Additional language is added to the text in **bold** without any further notation. Deleted language is shown in **bold** and with ~~strikethrough~~. Provisions to which we have no suggested changes to the language are not reproduced.*

R14-2-1601. Definitions

Suggested Change to subsection (13):

- (13) "ESP Service Agreement" means a ~~contract between an ESP and UDC to deliver power to retail end users~~ **Commission-approved agreement between an Affected Utility or a Utility Distribution Company and an Electric Service Provider. An ESP Service Agreement shall be a standardized agreement specific to each Affected Utility or UDC. It shall set forth the terms and conditions of competitive services to be provided by the Electric Service Provider in the service territory of the Affected Utility or the Utility Distribution Company. At a minimum, the agreement shall include provisions related to Electronic Data Interchange, Meter Reading Service, Metering Service, and compliance with the Scheduling Coordinator.**

Comment

Based on its experience in California, New West believes that limited regulatory involvement in market entry is sufficient and encourages competition. Standardized, Commission-approved agreements between ESP's and Affected Utilities or UDCs is the most efficient mechanism for controlling the technical and financial viability of competitors.

Accordingly, as we set forth in our comments below, the Commission should issue statewide Certificates of Convenience and Necessity ("CCN"). Having obtained a statewide CCN, an ESP would then enter into an ESP Service Agreement, which agreement would establish the terms and conditions for competition in the service area of the Affected Utility or UDC. We are attaching a sample ESP service agreement as a general example.

R14-2-1603. Certificates of Convenience and Necessity.

Suggested Change to subsection (A):

- (A) Any Electric Service Provider intending to supply services described in

R14-2-1605 or R14-2-1606, other than services subject to federal jurisdiction, shall obtain a **statewide** Certificate of Convenience and Necessity from the Commission pursuant to this Article; however, a Certificate is not required to offer information services or billing and collection services, ~~or self-aggregation.~~

Comment

In the last line of this subsection, we strike the words "or self-aggregation" to reflect our understanding that the Commission does not intend to require any aggregators to obtain CCNs. If aggregators in general do not require CCNs, then the smaller set of self-aggregators are exempted by definition. As this subsection is currently drafted, however, it creates confusion because it implies that aggregators that are not self-aggregators require a CCN. (*The same comment applies to R14-2-1605(B).*)

In line three (3), we insert the word "statewide" to reflect our position that Certificates of Convenience and Necessity should be issued for the entire State of Arizona. ESPs should not be required to file redundant applications for a CCN in order to compete in Arizona. The Rules currently require, however, that each ESP apply for a separate CCN for each geographic area in which it desires to compete. A single statewide certificate will reduce administration and encourage market entry.

The certification process should be as simple as possible, consistent with the Commission's constitutional and statutory obligations. Accordingly, as we develop more fully in later comments, the Rules should establish clearly defined standards for acceptance or denial of a certificate. The informational requirements should be minimal and should assure that the Affected Utilities do not receive any competitive advantage created by the application process. Finally, once an ESP obtains a certificate, it must then enter into an ESP Service Agreement with an Affected Utility or a UDC before it can begin actual competition in the service area of such Affected Utility or UDC. The ESP Service Agreements, not the CCN applications, should establish and guarantee the technical and financial ability of an ESP to compete.

Suggested Change to subsection (B):

- (B) Any company desiring such a **statewide** Certificate of Convenience and Necessity shall file with the Docket Control Center the required number of copies of an application. ~~Such Certificates shall be restricted to geographical areas served by Affected Utilities as of the date this Article is adopted and to serve areas added under the provisions of R14-2-1611(B).~~ In support of the request for a Certificate of Convenience and Necessity, the following information must be provided:

1. A description of the electric services which the applicant intends to offer;

2. The proper name and address of the applicant, and
 - a. The full name of the owner if a sole proprietorship,
 - b. The full name of each partner if a partnership,
 - c. A full list of officers and directors if a corporation, or
 - d. A full list of the members if a limited liability corporation;
and

3. A tariff for each service to be provided that states the **maximum rate and terms and conditions** that will apply to the provision of the service;

-
- ~~4. A description of the applicant's technical ability to obtain and deliver electricity and provide any other proposed services;~~

-
- ~~5. Documentation of the financial capability of the applicant to provide the proposed services, including the most recent income statement and balance sheet, the most recent projected income statement, and other pertinent financial information. Audited information shall be provided if available;~~

6. A description of the form of ownership (e.g., partnership, corporation);

-
- ~~7. Such other information as the Commission or Staff may request.~~

Comment

Since the Commission will be certifying Electric Service Providers statewide, and not just in the distribution service territories of public service corporations, authority to compete in Arizona should extend to all electrical distribution systems in the state.

The CCN application should be analogous to a license application. The Commission needs only such information as is necessary for it to contact the ESP, to monitor competition in Arizona, and to fulfill its constitutional mandates relative to rate-setting. Any further requirements might cause needless delay and expense to potential competitors.

Moreover, as we emphasize below in our comment to R14-2-1603(D), it is problematic to require disclosure of any information that could become available to Affected Utilities, particularly proprietary financial and technical information.

We point out that the provision on maximum rates is problematic. We recognize the constitutional reason for the floor and ceiling. But, certain pricing agreements might cause rates to fluctuate dramatically according to market prices. (Consider the recent hourly prices in certain

Midwest markets). Unless the maximum could be set at a very high rate, this provision will discourage innovative pricing agreements. We do not have a specific proposal on this point, but suggest that some flexible or averaging system be established to meet the constitutional requirements yet provide the necessary pricing flexibility.

If the Commission retains some or all of the requirements of this subsection, however, the requirements as currently drafted are vague. Such terms as "technical capability", "financial capability", and "other information" should be clearly and specifically defined in order to provide potential ESPs with predictable and understandable criteria for market entry in Arizona.

Comment to subsection (D):

It is not necessary to require a potential market entrant to serve information on a future competitor. This is especially true where information is such that it could be used by the competitor to prepare its competitive strategy, including rate variations and incentives, before the new entrant has obtained the necessary legal authority to compete.

Comment to subsection (E):

The provision is unnecessary would add a further obstacle to market entry by some ESPs and would deter some such entrants from competing in Arizona. Necessary security provisions can be efficiently achieved through ESP Service Agreements.

Suggested Change to subsection (F):

(F) The Commission may deny certification to any applicant who:

1. Does not provide the information required by this Article;

~~2. Does not possess adequate technical or financial capabilities to provide the proposed services;~~

3. Does not have ~~service acquisition agreements~~ an ESP Service Agreement with a ~~u~~Utility ~~d~~Distribution ~~e~~Company and ~~s~~Scheduling ~~e~~Coordinator, if the applicant is not its own ~~s~~Scheduling ~~e~~Coordinator;

~~4. Fails to provide a performance bond, if required;~~

~~5. Fails to demonstrate that its certification will serve in the public interest.~~

3. Fails to pay Transaction Privilege Taxes on Retail Business in Arizona

Comment

Item 2 should be deleted because the technical and financial capabilities of an ESP can be controlled through the ESP Service Agreements.

Item 3 should be edited to correspond to the defined terms in the Rules.

Item 4: The performance bond should not be a precondition to certification. We develop this concept in our comment to R14-2-1603(H).

Item 5 is not necessary. HB 2663 provides that "[i]t is the public policy of this state that a competitive market shall exist in the sale of electric generation service." (A.R.S. § 40-202(B).) Therefore, an ESP's participation in the competitive market is now in the public interest by legislative fiat. Accordingly, the ESP should not be required to make such a demonstration to the Commission.

Suggested Changes to subsection (G):

(G) Every Electric Service Provider obtaining a Certificate of Convenience and Necessity under this Article shall obtain certification subject to the following conditions:

1. The Electric Service Provider shall comply with all Commission rules, orders, and other requirements relevant to the provision of electric service ~~and relevant to resource planning~~;

Comment

Resource planning is an undefined term that does not provide adequate notice of the requirements for remaining certificated in Arizona. Resource planning is more of a regional phenomenon in a competitive market. The market should and will control resource planning.

Comment to subparagraph (G)(2):

This subparagraph should be deleted as unnecessary. The disclosure of information by an ESP is unnecessary and might lead to creating competitive advantages and disadvantages.

Comment to subparagraph (G)(3):

Same comment as for subsection (G)(2) above.

Suggested Change to subparagraph (G)(4):

4. The Electric Service Provider shall maintain on file with the

Commission all current tariffs ~~and any service standards~~ that the Commission ~~shall~~ may require;

Comment

"Service standards" is an undefined term that does not provide adequate notice of the requirements for remaining certificated in Arizona.

Comment to subparagraph (G)(6):

This subparagraph should be deleted. State-law permit and license requirements will be regulated by the entities issuing the licenses or permits.

Comment to subsection (H):

This subsection should be deleted. A performance bond or escrow requirement should not be a precondition to certification because, before the ESP commences to do business in the state, the amount of the bond or to be held in escrow can only be based on estimations. An ESP should be required to post a performance bond or to hold funds in escrow that are sufficient to cover advances or deposits from its customers, but this requirement should initiate after certification and should reflect the actual amount of deposits.

R14-2-1604. Competitive Phases.

Suggested Change to subsection (B):

- (B) Groups of Affected Utility customers with individual peak load demands of 40 kW or greater aggregated into a combined load of 1 MW or greater will be eligible for competitive services ~~no later than~~ beginning January 1, 1999. If peak load demand data are not available, the 40 kW criterion ~~can be determined to~~ will be met if the customer's usage exceeded 16,500 kWh in any month within the last twelve consecutive months. ~~From January 1, 1999, through December 31, 2000, aggregation of new competitive customers will be allowed until such time as 20% of the Affected Utility's 1995 system peak demand is served by competitors. At that point all additional aggregated customers must wait until January 1, 2001, to obtain competitive service.~~

Comment

Generally, subsections (A) and (B) provide inadequate information concerning the mechanics of customer selection. For example, it is not clear how an Affected Utility will determine when it can aggregate loads. Further, the word "customer" is undefined. The rule should clarify whether a "customer" refers to a single meter or to an entity with more than one meter.

Moreover, the rule should clarify whether, if a single site is over 1 MW, all lesser sites for the same entity also become eligible for competition.

With respect to the current draft of subsection (B), until December 31, 2000, if the total of eligible customers under subsection (A), plus the eligible customers under (B), reaches 20% of the Affected Utility's 1995 system peak demand, then no further aggregation is possible until January 1, 2001. Additional customers, however, can become eligible for competition under subsection (A). This provision favors large ESPs who can provide incentives for aggregation at the earliest possible date. Moreover, it unnecessarily penalizes small customers who might not be prepared to aggregate in the early phases of competition. Therefore, the last two sentences of the subsection should be deleted, and the rule should provide that aggregation is available to combined loads of more than 1 MW beginning no later than January 1, 1999.

Comment on subsection (H):

This subsection should be deleted. The provision as currently drafted allows a UDC to bypass the affiliate rules and gain an unfair competitive advantage. An out-of-state ESP could also use this provision to compete in Arizona without fulfilling the certification or ESP Service Agreement requirements.

R14-2-1605. Competitive Services.

Comment:

We reiterate our comment to R14-2-1603(A) concerning self-aggregation.

R14-2-1606. Services Required to Be Made Available by Affected Utilities.

Comment:

This section applies only to Affected Utilities. Accordingly, references to ESPs should be changed to refer to Affected Utilities.

Comment to subsection (A):

The Standard Offer provisions should be reconsidered so as to not give a competitive advantage to the utility providing the standard offer.

Comment to Subparagraph (A)(1):

The Rules do not contain a supplier of last resort provision. The Rules should specify that the UDC is the supplier of last resort for load under 100,000 kW per year. Moreover, subparagraph (A)(1) should clarify that the discontinuation of Standard Offer tariffs does not affect a UDC's supplier of last resort obligation.

Comment to subsection (B):

Notwithstanding subsection (A), this provision implies that the Standard Offer will continue after January 1, 2001. Does the Commission intend that Standard Offer will transfer to UDCs from Affected Utilities after January 1, 2001? If so, does subsection (B) apply only to Standard Offers that have not been discontinued under subsection (A)?

Comment to subsection (F):

This provision should be deleted. It would permit the lowest bidding ESP to capture the entire Standard Offer load of a UDC. The provision encourages predatory pricing and potential statewide monopoly.

Comment to subparagraph (J)(3):

It has become impossible to submit a report within 60 days of December 31, 1997, the date indicated in R14-2-1602.

R14-2-1609. Solar Portfolio Standard.

Comment:

This section should be reconsidered so that it does not discourage market entry by smaller ESP's, especially ESP's purchasing their requirements from a power exchange.

The section's appears to assume that all ESPs are generators. In fact, ESPs that are not generators cannot easily comply with this provision because they will generally purchase power from commingled sources and will have no reliable mechanism for determining the origin of their purchased power. Moreover, they could not enter into long-term contracts because they could not predict the cost, or the availability, of eligible power.

Especially in the context of a newly deregulated market, where predictability is difficult, this provision will deter potential power marketers and other non-generating ESPs from competing in Arizona.

We suggest that the Commission consider different mechanisms to encourage the development of renewable resources.

R14-2-1610. Transmission and Distribution Access.

The Commission should be careful to assure no conflict with FERC jurisdiction.

R14-2-1611. Reciprocity.

Comment:

This section should be deleted in its entirety. A system of statewide CCNs and standardized, Commission-approved ESP Service Agreements renders these reciprocity provisions unnecessary.

R14-2-1612. Rates.

Comment to subsection (B):

We reiterate our comment to R14-1-1603(B)(3) with respect to the requirement to file maximum rates. In addition, this provision does not establish any time limitations for the Commission to approve such rates. To give predictability, such rates should be deemed approved unless the Commission disallows them within an established period of time. The rule should also set the criteria for Commission review and approval of such rates.

Comment to subsections (C) and (J):

These provisions should be deleted. Any requirement to approve customer agreements is unnecessary and could disclose information to competitors. If review is required, the rules should establish strict time limitations for such review, and contracts should be presumptively valid unless disapproved within the established time period and under clear criteria.

Comment to subsection (K):

This provision should be deleted. There is no competitive need to set minimum prices. If the Commission's concern is predatory prices, antitrust law already governs and controls such practices. Occasional below cost pricing, however, may be justifiable under sound business principles. Market conditions, for example, could require occasional short-term sales below marginal cost.

In addition, the provision does not define "marginal cost." Indeed, it would be difficult to arrive at a meaningful definition. For example, the term is essentially meaningless for brokers, whose marginal cost is essentially the market rate.

Finally, this provision does not specify the consequences of a sale below marginal cost. Does the Commission intend to force ESPs to default on their contracts if there is a below-cost sale?

Comment to subsection (L):

This subsection should be deleted. No filing of maximum rates should be required. Accordingly, no filing for *changes* to maximum rates should be necessary. If the Commission does

require such a filing, however, the filed rates should be presumptively valid unless rejected within an established time period and under clear criteria.

R14-2-1613. Service Quality, Consumer Protection, Safety, and Billing Requirements.

Comment to subsection (A):

Our comments to section R14-2-210, below, demonstrate our belief that substantial portions of this section should not apply to ESPs.

Comment to subsection (D):

This section should be redrafted to clarify that compliance with applicable reliability standards is the responsibility of the scheduling coordinator, the ISO or the ISA, and notification of scheduled outages is the responsibility of the UDC. This section should not apply to other ESPs.

Suggested Change to subsection (E):

- (E) Each Electric Service Provider shall provide at least 30 days notice to all of its affected customers **of its intent to cease providing** ~~if it is no longer obtaining~~ generation, transmission, distribution, or ancillary services ~~necessitating that the consumer obtain service from another supplier of generation, transmission, distribution, or ancillary services.~~

Comment

The suggested change is intended to clarify and simplify this provision.

Comment to subsections (F) and (G):

These provisions should apply only to UDCs.

Comment to subsection (H):

ESPs should not be required to have toll-free numbers. The UDC number should be listed for safety inquiries. There is no need to refer safety inquiries to ESPs that are not UDCs.

Comment to subsection (I):

The provisions of this subsection are overly technical. Rules of this nature may need to be adjusted after competition begins to accommodate for the realities of competition. The Commission's rule-making procedures would preclude the possibility of implementing changes to these rules in a timely fashion.

If the rules are included, the current draft contains numerous terms that are not defined and therefore do not provide adequate notice of their requirements.

Comment to Subparagraph (1):

An ESP should be required to provide information to Affected Utilities, UDCs, Scheduling Coordinators, and the ISO/ISA in order to facilitate system reliability. No other information exchange requirements should be imposed by rule. The market will impose such requirements through metering or meter reading agreements.

Suggested change to subparagraph (I)(2):

- (2) ~~A consumer or an Electric Service Provider~~ Any person relying on metering information provided by ~~another an~~ Electric Service Provider may request a meter test according to the tariff on file ~~and approved~~ by the Commission. However, if the meter is found to be in error ~~by more than 3% in excess of Commission-approved standards~~, no meter testing fee will be charged.

Comment

The category of persons that can request a meter test should be expanded to include any person relying on metering information. The Commission should not approve tariffs for meter testing. Rather than establishing a set percentage of error, the rule should refer to a Commission-approved standard. This will enable changes to the standard without amending the rule.

Comment to Subparagraph (3):

The reference to R14-2-1606(I) should be to R14-2-1606(J).

Suggested Change and Comment to Subparagraph (5):

The UIG should be required to complete its standards at least 60 days before the onset of competition. If the standards are not completed in a timely fashion, the rule should establish interim standards. In the penultimate line, "can" should be changed to "shall".

Suggested Change and Comment to Subparagraph (6):

The second sentence should be changed as follows: "This data will be **securely** transferred via the Internet ~~using a secure sockets layer~~." This change will preserve the security requirement but will permit other forms of security than a secure sockets layer.

Comment to Subparagraph (10):

The term "control" is overbroad unless it is defined. Moreover, the role of the MRSP is unclear in this provision. Does the Commission intend the MRSP to be a representative of the ESP?

Comment to Subparagraph (11)-(16):

As stated above, these subparagraphs contain undefined terms and are overly technical for the rules.

Comment to subsection (M):

If an ESP is mandated to provide the listed information on their billing statements, then Affected Utilities and UDCs should be mandated to provide such information that is in their control to the ESP in order to permit the ESP to meet its requirements.

R14-2-1614. Reporting Requirements.

Comment:

This entire section should be deleted. The reporting requirements are unnecessary and will impose additional costs on the market.

R14-2-1615. Administrative Requirements.

Comment to subsection (A):

We reiterate our comments on maximum rates. In addition, if such a filing is required, the filed rate should be presumed valid unless the Commission disapproves it within an established period of time and under clear and defined criteria.

Comment to subsection (B):

We reiterate that there should be no requirement to file contracts because of confidentiality and the burden on competition.

Comment to subsection (C):

The simplification of the Rules that we are proposing herein obviates the need for any exemptions or variations.

R14-2-1617. Electric Affiliate Transaction Rules.

No comments.

R14-2-1618. Information Disclosure Label.

Comment:

This section should be deleted in its entirety. It is unlikely to assist customers in making a reasoned choice of electricity suppliers.

R14-2-210. Billing and Collection.

Comment:

In general, these provisions are overly technical and should not be included in the Rules. Despite their technicality, however, the section fails to clarify a significant issue: who has the right to bill a customer?

Comment to subsection (A):

Comment to subparagraph (A)(2):

The terms "utility" and "customer" are not defined.

Comment to subparagraphs (A)(3)-(16):

As stated above, the rules for estimated meter reading should be developed by the working group and should not be included in these rules.

Comment to subparagraph (B)(2)(i):

The term "LDC" is not defined.

Comment to subsections (C)-(I):

These provisions should be deleted in their entirety. They do not apply to ESPs, and to the extent they apply to UDCs, they should be covered by the UDC's tariffs.



Pacific Gas and Electric Company

ENERGY SERVICE PROVIDER (ESP) SERVICE AGREEMENT

This Energy Service Provider (ESP) Service Agreement (this "Agreement") is made and entered into as of this ____ day of _____, _____, by and between

"(ESP)", a _____ organized and existing under the laws of the state of _____, and "Pacific Gas and Electric Company" ("PG&E"), a corporation organized and existing under the laws of the state of California. From time to time, ESP and PG&E shall be individually referred to herein as a "Party" and collectively as the "Parties."

Section 1: General Description of Agreement

- 1.1 This Agreement is a legally binding contract. The Parties named in this Agreement are bound by the terms set forth herein and otherwise incorporated herein by reference. This Agreement shall govern the business relationship between the Parties hereto by which ESP shall offer electrical energy services, including, but not limited to, account maintenance and billing services, electrical meter installation, meter reading services and/or any other services that may be approved by the California Public Utilities Commission ("CPUC") in Direct Access transactions with customers in PG&E's service territory ("Direct Access Services"). Each Party, by agreeing to undertake specific activities and responsibilities for or on behalf of customers, acknowledges that each Party shall relieve and discharge the other Party of the responsibility for said activities and responsibilities with respect to those customers. Except where explicitly defined herein (including Attachment A hereto) the definitions controlling this Agreement are contained in PG&E's applicable rules or in the relevant direct access tariff.
- 1.2 The form of this Agreement has been developed as part of the CPUC regulatory process, was intended to conform to CPUC directions, was filed and approved by the CPUC for use between PG&E and ESPs and may not be waived, altered, amended or modified, except as provided herein or in the relevant direct access tariff, or as may otherwise be authorized by the CPUC.

Section 2: Representations

- 2.1 Each Party represents that it is and shall remain in compliance with all applicable laws and tariffs, including applicable CPUC requirements.
- 2.2 Each person executing this Agreement for the respective Parties expressly represents and warrants that he or she has authority to bind the entity on whose behalf this Agreement is executed.

- 2.3 Each Party represents that (a) it has the full power and authority to execute and deliver this Agreement and to perform its terms and conditions; (b) the execution, delivery and performance of this Agreement have been duly authorized by all necessary corporate or other action by such Party; and (c) this agreement constitutes such Party's legal, valid and binding obligation, enforceable against such Party in accordance with its terms.
- 2.4 Each Party shall (a) exercise all reasonable care, diligence and good faith in the performance of its duties pursuant to this Agreement; and (b) carry out its duties in accordance with applicable recognized professional standards in accordance with the requirements of this Agreement.

Section 3: Term of Service

The term of this Agreement shall commence on the date of execution by both Parties hereto (the "Effective Date") and shall terminate on the earlier of (a) the date ESP informs PG&E that it is no longer operating as an ESP in PG&E's service territory; (b) the earlier termination pursuant to Section 4 hereof; or (c) the effective date of a new ESP Service Agreement between the Parties hereto. Notwithstanding the Effective Date of this Agreement, the ESP acknowledges that it may only offer Direct Access Services to customers effective January 1, 1998, or such other date as may be directed by the CPUC for commencement of such services by ESPs, and only after it has complied with all provisions of this Agreement and PG&E's applicable tariffs.

Section 4: Events of Default and Remedy for Default

- 4.1 An Event of Default under this Agreement shall include either Party's material breach of any provision of this Agreement, including those incorporated by reference herein, and failure to cure such breach within thirty (30) calendar days of receipt of written notice thereof from the non-defaulting Party; or such other period as may be provided by this Agreement or PG&E's direct access tariff.
- 4.2 In the event of such an Event of Default, the non-defaulting Party shall be entitled (a) to exercise any and all remedies available under PG&E's direct access tariff; (b) to the extent not inconsistent with PG&E's direct access tariff, to exercise any and all remedies provided for by law or in equity; and (c) in the event of a material Event of Default, to terminate this Agreement upon written notice to the other Party, which shall be effective upon the receipt thereof.
- 4.3 Breach by any Party hereto of any provision of PG&E's direct access tariff shall be governed by applicable provisions contained therein and each Party will retain all rights granted thereunder.

Section 5: Billing, Metering and Payment

- 5.1 Billing options and metering services which are available to ESP shall be as described in PG&E's direct access tariff, as stated in PG&E's Electric Rule 22. Billing and metering options applicable to a particular customer shall be designated in the Direct Access Service Request submitted by the ESP for such customer.
- 5.2 PG&E will bill and the ESP agrees to pay PG&E for all services and products provided by PG&E in accordance with the terms and conditions set forth in PG&E's direct access tariff, as stated in PG&E's Electric Rule 22 and PG&E's rate schedules. Any services provided by the ESP to PG&E shall be by separate agreement between the Parties and are not a subject of this Agreement.

Section 6: Limitation of Liability

Each Party's liability to the other Party for any loss, cost, claim, injury, liability, or expense, including reasonable attorneys' fees, relating to or arising from any act or omission in its performance of this Agreement, shall be limited to the amount of direct damage actually incurred, except as provided for in this Section. In no event shall either Party be liable to the other Party for any indirect, special, consequential, or punitive damages of any kind whatsoever, whether in contract, tort or strict liability, except in the event of an action covered by the Indemnification provisions of Section 7 of this Agreement, in which event this Section 6 shall not be applicable.

Section 7: Indemnification

- 7.1 To the fullest extent permitted by law, and subject to the limitations set forth in Section 6 of this Agreement, each Party (the "Indemnifying Party") shall indemnify and hold harmless the other Party, and its current and future direct and indirect parent companies, affiliates and their shareholders, officers, directors, employees, agents, servants and assigns (collectively, the "Indemnified Party") and at the Indemnified Party's option, the Indemnifying Party shall defend the Indemnified Party from and against any and all claims and/or liabilities for losses, expenses, damage to property, injury to or death of any person, including, but not limited to, the Indemnified Party's employees and its affiliates' employees, subcontractors and subcontractors' employees, or any other liability incurred by the Indemnified Party, including reasonable expenses, legal and otherwise, which shall include reasonable attorneys' fees, caused wholly or in part by any negligent, grossly negligent or willful act or omission by the Indemnifying Party, its officers, directors, employees, agents or assigns arising out of this Agreement, except to the extent caused wholly or in part by any negligent, grossly negligent or willful act or omission of the Indemnified Party.

- 7.2 If any claim covered by Section 7.1 is brought against the Indemnified Party, then the Indemnifying Party shall be entitled to participate in, and unless in the opinion of counsel for the Indemnified Party a conflict of interest between the Parties may exist with respect to such claim, assume the defense of such claim, with counsel reasonably acceptable to the Indemnified Party. If the Indemnifying Party does not assume the defense of the Indemnified Party, or if a conflict precludes the Indemnifying Party from assuming the defense, then the Indemnifying Party shall reimburse the Indemnified Party on a monthly basis for the Indemnified Party's defense through separate counsel of the Indemnified Party's choice. Even if the Indemnifying Party assumes the defense of the Indemnified Party with acceptable counsel, the Indemnified Party, at its sole option, may participate in the defense, at its own expense, with counsel of its own choice without relieving the Indemnifying Party of any of its obligations hereunder. In no event shall either Party be liable to the other Party for any indirect, special, consequential, or punitive damages of any kind whatsoever, whether in contract, tort or strict liability.
- 7.3 The Indemnifying Party's obligation to indemnify under this Section 7 shall survive termination of this Agreement, and shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Indemnifying Party under any statutory scheme, including, without limitation, under any Workers Compensation Acts, Disability Benefit Acts or other Employee Benefit Acts.

Section 8: Assignment and Delegation

- 8.1 Neither Party to this Agreement shall assign any of its rights or obligations under this Agreement, except with the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. No assignment of this Agreement shall relieve the assigning Party of any of its obligations under this Agreement until such obligations have been assumed by the assignee. When duly assigned in accordance with the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the assignee and the assignor shall be relieved of its rights and obligations. Any assignment in violation of this Section 8 shall be void.
- 8.2 Notwithstanding the provisions of this Section 8, either Party may subcontract its duties under this Agreement to a subcontractor, provided that the subcontracting Party shall remain fully responsible as a principal and not as a guarantor for performance of any subcontracted duties, shall serve as the point of contact between its subcontractor and the other Party, and shall provide the other Party with thirty (30) calendar days' prior written notice of any such subcontracting, which notice shall include such information about the subcontractor as the other Party shall reasonably require, and provided further that each Party may subcontract its obligation to provide Metering or Meter Reading Services under this Agreement only to subcontractors who have complied with all certification or registration requirements described in applicable law, CPUC rules and PG&E's

direct access tariff. If either Party subcontracts any of its duties hereunder, it shall cause its subcontractors to perform in a manner which is in conformity with that Party's obligations under this Agreement.

Section 9: Independent Contractors

Each Party shall perform its obligations under this Agreement (including any obligations performed by a Party's designees as permitted under Section 8 of this Agreement) as an independent contractor.

Section 10: Entire Agreement

This Agreement consists of, in its entirety, this Energy Service Provider Service Agreement and all attachments hereto, all Direct Access Service Requests submitted pursuant to this Agreement and PG&E's direct access tariff. This Agreement supersedes all other agreements or understandings, written or oral, between the Parties related to the subject matter hereof. This Agreement may be modified from time to time only by an instrument in writing, signed by both Parties.

Section 11: Nondisclosure

- 11.1 Neither Party may disclose any Confidential Information obtained pursuant to this Agreement to any third party, including affiliates of such Party, without the express prior written consent of the other Party. As used herein, the term "Confidential Information" shall include, but not be limited to, all business, financial, and commercial information pertaining to the Parties, customers of either or both Parties, suppliers for either Party, personnel of either Party, any trade secrets, and other information of a similar nature, whether written or in intangible form that is marked proprietary or confidential with the appropriate owner's name. Confidential Information shall not include information known to either Party prior to obtaining the same from the other Party, information in the public domain, or information obtained by a Party from a third party who did not, directly or indirectly, receive the same from the other Party to this Agreement or from a party who was under an obligation of confidentiality to the other Party to this Agreement or information developed by either Party independent of any Confidential Information. The receiving Party shall use the higher of the standard of care that the receiving Party uses to preserve its own confidential information or a reasonable standard of care to prevent unauthorized use or disclosure of such Confidential Information. Each receiving Party shall, upon termination of this Agreement or at any time upon the request of the disclosing Party, promptly return or destroy all Confidential Information of the disclosing Party then in its possession.

- 11.2 Notwithstanding the preceding, Confidential Information may be disclosed to any governmental, judicial or regulatory authority requiring such Confidential Information pursuant to any applicable law, regulation, ruling, or order, provided that: (a) such Confidential Information is submitted under any applicable provision, if any, for confidential treatment by such governmental, judicial or regulatory authority; and (b) prior to such disclosure, the other Party is given prompt notice of the disclosure requirement so that it may take whatever action it deems appropriate, including intervention in any proceeding and the seeking of any injunction to prohibit such disclosure.

Section 12: Enforceability

If any provision of this Agreement or the application thereof, is to any extent held invalid or unenforceable, the remainder of this Agreement and the application thereof, other than those provisions which have been held invalid or unenforceable, shall not be affected and shall continue in full force and effect and shall be enforceable to the fullest extent permitted by law or in equity.

Section 13: Notices

- 13.1 Except as otherwise provided in this Agreement, any notices under this Agreement shall be in writing and shall be effective upon delivery if delivered by (a) hand; (b) U.S. Mail, first class postage pre-paid, or (c) facsimile, with confirmation of receipt to the Parties as follows:

If the notice is to ESP:

Contact Name: _____

Business Address: _____

Facsimile: _____

If the notice is to PG&E:

Contact Name: Director of ESP Relations

Business Address:

Account Services Department

Mail Code H 28 B

P.O. Box 770000

San Francisco, CA 94177

- 13.2 Each Party shall be entitled to specify as its proper address any other address in the United States upon written notice to the other Party.
- 13.3 Each Party shall designate on Attachment A the person(s) to be contacted with respect to specific operational matters relating to Direct Access service. Each Party shall be entitled to specify any change to such person(s) upon written notice to the other Party.

Section 14: Time of Essence

The Parties expressly agree that time is of the essence for all portions of this Agreement.

Section 15: Dispute Resolution

- 15.1 The form of this Agreement has been filed with and approved by the CPUC as part of PG&E's applicable tariffs. Except as provided in Section 15.2 and 15.3, any dispute arising between the Parties relating to interpretation of the provisions of this Agreement or to the performance of PG&E's obligations hereunder (including the performance of Billing Services, Metering Services and MDMA Services by PG&E) shall be reduced to writing and referred to the Parties' representatives identified on Attachment A for resolution. Should such a dispute arise, the parties shall be required to meet and confer in an effort to resolve their dispute. Pending resolution, the Parties shall proceed diligently with the performance of their respective obligations under this Agreement, except if this Agreement has been terminated under Section 4.2. If the Parties fail to reach an agreement within a reasonable period of time, the matter shall, upon demand of either Party, be submitted to resolution before the CPUC in accordance with the CPUC's rules, regulations and procedures applicable to resolution of such disputes.
- 15.2 Any dispute arising between the Parties relating to interpretation of the provisions of this Agreement or to the performance of the ESP's obligations hereunder (including the performance of Billing Services, Metering Services and MDMA Services by the ESP) shall be reduced to writing and referred to the Parties' representatives identified on Attachment A for resolution. Should such a dispute arise, the parties shall be required to meet and confer in an effort to resolve their dispute. Pending resolution, the Parties shall proceed diligently with the performance of their respective obligations under this Agreement, except if this Agreement has been terminated under Section 4.2. If the Parties fail to reach an agreement within a reasonable period of time, the parties may mutually agree to pursue mediation or arbitration to resolve such issues.
- 15.3 Notwithstanding the provisions of Paragraph 15.1 and 15.2 above: (a) all disputes between the Parties relating to the payment by the ESP of any PG&E fees or

charges shall be subject to the provisions of PG&E's applicable tariffs governing disputes over customer bills; (b) all disputes between the Parties regarding Competition Transition Charges payable by direct access customers or the ESP on behalf of such customers shall be subject to the provisions of PG&E's applicable tariffs; and (c) PG&E may pursue available remedies for unauthorized electrical use by the ESP in a court of competent jurisdiction.

- 15.4 If the dispute involves a request for damages, parties are notified that the Commission has no authority to award damages. To resolve such issues, the parties may mutually agree to pursue mediation or arbitration to resolve such issues, or if no agreement is reached, to pursue other legal remedies that are available to the parties.

Section 16: Applicable Law and Venue

This Agreement shall be interpreted, governed by and construed in accordance with the laws of the State of California, and shall exclude any choice of law rules that direct the application of the laws of another jurisdiction, irrespective of the place of execution or of the order in which the signatures of the parties are affixed or of the place or places of performance. Except for matters and disputes with respect to which the CPUC is the sole proper venue for dispute resolution pursuant to applicable law or this Agreement, the federal and state courts located in San Francisco County, California shall constitute the sole proper venue for resolution of any matter or dispute hereunder, and the Parties submit to the exclusive jurisdiction of such courts with respect to such matters and disputes.

Section 17: Force Majeure

Neither Party shall be liable for any delay or failure in the performance of any part of this Agreement (other than obligations to pay money) due to any event of force majeure or other cause beyond its reasonable control, including but not limited to, unusually severe weather, flood, fire, lightning, epidemic, quarantine restriction, war, sabotage, act of a public enemy, earthquake, insurrection, riot, civil disturbance, strike, work stoppage caused by jurisdictional and similar disputes, restraint by court order or public authority, or action or non-action by or inability to obtain authorization or approval from any governmental authority, or any combination of these causes, which by the exercise of due diligence and foresight such Party could not reasonably have been expected to avoid and which by the exercise of due diligence is unable to overcome. It is agreed that upon the Party so affected giving written notice and reasonably full particulars of such force majeure to the other Party within a reasonable time after the cause relied on, then the obligations of the Party, so far as they are affected by the event of force majeure, shall be suspended during the continuation of such inability and circumstance and shall, so far as possible, be remedied with all reasonable dispatch. In the event of force majeure, as described herein, both Parties shall take all reasonable steps to comply with this Agreement

and PG&E's applicable tariffs despite occurrence of a force majeure event.

Section 18: Unauthorized Use of Energy (Energy Theft)

- 18.1 The ESP represents and warrants that for each of its Customers, and at all times during which it provides Direct Access services as an Energy Service Provider, the ESP shall completely, accurately, and in a timely manner account for each of its Customer's loads with a duly authorized Scheduling Coordinator. Load data not accounted for in this manner may provide grounds for termination of this Agreement. For verification purposes only, PG&E shall have complete access to the identity of the Scheduling Coordinator and the load data provided to it by the ESP. Such information is to remain confidential, and shall not be disclosed to any unauthorized person.
- 18.2 PG&E shall notify the ESP immediately and the ESP shall notify PG&E immediately of any suspected unauthorized energy use. The Parties agree to preserve any evidence of unauthorized energy use. Once unauthorized energy use is suspected, PG&E, in its sole discretion, may take any or all of the actions permitted under PG&E's applicable tariffs.

Section 19: Not a Joint Venture

Unless specifically stated in this Agreement to be otherwise, the duties, obligations, and liabilities of the Parties are intended to be several and not joint or collective. Nothing contained in this Agreement shall ever be construed to create an association, trust, partnership or joint venture or to impose a trust or partnership duty, obligation, or liability on or with regard to either Party. Each Party shall be liable individually and severally for its own obligations under this Agreement.

Section 20: Conflicts Between this Agreement and PG&E's Direct Access Tariff

Should a conflict exist or develop between the provisions of this Agreement and PG&E's direct access tariff, as approved by the CPUC, the provisions of PG&E's direct access tariff shall prevail.

Section 21: Amendments or Modifications

- 21.1 Except as provided in Section 21.2, no amendment or modification shall be made to this Agreement, in whole or in part, except by an instrument in writing executed by authorized representatives of the Parties, and no amendment or modification shall be made by course of performance, course of dealing or usage of trade.

21.2

This Agreement may be subject to such changes or modifications as the CPUC may from time to time direct or necessitate in the exercise of its jurisdiction, and the Parties may amend the Agreement to conform to changes directed or necessitated by the CPUC. In the event the Parties are unable to agree on the required changes or modifications to this Agreement, their dispute shall be resolved in accordance with the provisions of Section 15 hereof or, in the alternative, ESP may elect to terminate this Agreement upon written notice to PG&E, which shall be effective upon the receipt thereof. PG&E retains the right to unilaterally file with the CPUC, pursuant to the CPUC's rules and regulations, an application for a change in PG&E's rates, charges, classification, service or rules, or any agreement relating thereto.

Section 22: Billing Options Offered to End-Use Customers by ESP

Check which billing options (as described in PG&E's direct access tariff) ESP intends to provide its Customers under this Agreement.

_____ **Consolidated Billing by PG&E.**

_____ **Consolidated Billing by the ESP.**

_____ **Separate PG&E and ESP Bills.**

ESP may change these elections from time to time in compliance with the relevant direct access tariff upon prior written notice to PG&E. The Direct Access Service Request (DASR) for each Direct Access customer will specify which billing option will apply to that customer. If ESP specifies in any DASR any billing option that has not been checked above, the DASR will be rejected.

Section 23: Meter Options Offered to End-Use Customers by ESP

Check which meter options (as described in PG&E's direct access tariff) ESP will offer for some or all of its Customers served under this Agreement.

_____ **ESP will provide Hourly Meters.**

_____ **ESP will offer Hourly Meter Installation Services.**

_____ **ESP will offer Hourly Meter Reading Services.**

ESP may change these elections from time to time in compliance with PG&E's direct access tariff upon prior written notice to PG&E. The Direct Access Service Request (DASR) for each Direct Access customer will specify which metering option will apply to that Customer. If ESP specifies in any Direct

Access Service Request any metering option that has not been checked above, the DASR will be rejected.

Section 24: Audits

- 24.1 PG&E and the ESP shall each retain such specific records as may be required to support the accuracy of meter data provided in their respective consolidated billings. When either Party reasonably believes that errors related to metering or billing activity may have occurred, a Party may request the production of such documents as may be required to verify the accuracy of such metering and consolidated billing. Such documents shall be provided within ten (10) business days of such request. In the event the requesting Party, upon review of such documents, continues to believe that the other Party's duty to accurately meter and provide consolidated billing for usage has been breached, the requesting Party may direct that an audit be conducted PG&E and the ESP shall designate their own employee representative or their contracted representative to audit the other party's records.
- 24.2 Any such audit shall be undertaken by PG&E, the ESP, or their contracted representative at reasonable times without interference with the audited Party's business operations, and in compliance with the audited Party's security procedures. PG&E and the ESP agree to cooperate fully with any such audit.
- 24.3 Specific records to support the accuracy of meter data provided in the consolidated billings may require examination of billing and metering support documentation maintained by subcontractors. PG&E and the ESP shall include a similar clause in their agreements with their subcontractors reserving the right to designate their own employee representative or their contracted representative to audit records related to consolidated billing to Direct Access Customers.
- 24.4 The auditing Party will notify the audited Party in writing of any exception taken as a result of an audit. The audited Party shall refund the amount of any undisputed exception to the auditing Party within ten (10) days. If the audited Party fails to make such payment, the audited Party agrees to pay interest, accruing monthly, at a rate equal to the prime rate plus two percent (2%) of Bank of America NT&SA, San Francisco, or any successor institution, in effect from time to time, but not to exceed the maximum contract rate permitted by the applicable usury laws of the State of California. Interest will be computed from the date of written notification of exceptions to the date the audited Party reimburses the auditing Party for any exception. The cost of such audit shall be paid by the auditing Party; provided, however, that in the event an audit verifies overcharges of five percent (5%) or more, then the audited Party shall

reimburse the auditing Party for the cost of the audit.

- 24.5 This right to audit shall extend for a period of three (3) years following the date of final payment under this Agreement. Each party and each subcontractor shall retain all necessary records and documentation for the entire length of this audit period.

Section 25: Miscellaneous

- 25.1 Unless otherwise stated in this Agreement: (a) any reference in this Agreement to a section, subsection, attachment or similar term refers to the provisions of this Agreement; (b) a reference to a section includes that section and all its subsections; and (c) the words "include," "includes," and "including" when used in this Agreement shall be deemed in each case to be followed by the words "without limitation." The Parties agree that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting Party shall not be employed in the interpretation of this Agreement
- 25.2 The provisions of this Agreement are for the benefit of the Parties and not for any other person or third party beneficiary. The provisions of this Agreement shall not impart rights enforceable by any person, firm or organization other than a Party or a successor or assignee of a Party to this Agreement.
- 25.3 The descriptive headings of the various sections of this Agreement have been inserted for convenience of reference only and shall in no way define, modify or restrict any of the terms and provisions thereof.
- 25.4 Any waiver at any time by either Party of its rights with respect to a default under this Agreement, or with respect to any other matter arising in connection with this Agreement, shall not be deemed a waiver with respect to any other or subsequent default or matter and no waiver shall be considered effective unless in writing.
- 25.5 Each Party shall be responsible for paying its own attorneys' fees and other costs associated with this Agreement, except as provided in Sections 6 and 7 hereof. If a dispute exists hereunder, the prevailing Party, as determined by the CPUC, or as may otherwise be determined by the dispute resolution procedure contained in Section 15 hereof, if used, or by a court of law, shall be entitled to reasonable attorneys' fees and costs.

- 25.6 To the extent that the CPUC has a right under then-current law to audit either Party's compliance with this Agreement or other legal or regulatory requirements pertaining to Direct Access transactions, that Party shall cooperate with such audits. Nothing in this Section shall be construed as an admission by either Party with respect to the right of the CPUC to conduct such audits or the scope thereof.
- 25.7 Except as otherwise provided in this Agreement, all rights of termination, cancellation or other remedies in this Agreement are cumulative. Use of any remedy shall not preclude any other remedy in this Agreement.

The Parties have executed this Agreement on the dates indicated below, to be effective upon the later date.

On Behalf of ESP

By: _____
Name: _____
Title: _____
Date: _____

On Behalf of PG&E

By: _____
Name: _____
Title: _____
Date: _____

ATTACHMENT A

A. Definitions:

Billing Services - The consolidated billing services described in PG&E's direct access tariff which are provided by PG&E and/or ESP.

Consolidated ESP Bill - The consolidated bill prepared and presented by ESP to an end-use customer which includes the customer's ESP Charges and PG&E Charges.

Consolidated PG&E Bill - The consolidated bill prepared and presented by PG&E to an end-use customer which includes the Customer's ESP Charges and PG&E Charges.

Direct Access Customer - An end-use customer located within PG&E's service territory who purchases Direct Access Services through the ESP.

ESP Charges - Charges for Direct Access Services provided by the ESP.

Metering Services - The meter installation, maintenance and related services described in PG&E's direct access tariff which are provided by PG&E and/or ESP.

Meter Reading Services - The meter reading and related services described in PG&E's direct access tariff which are provided by PG&E and/or ESP.

PG&E Charges - Charges (a) for services provided by PG&E; or (b) which are energy-related and which are approved by the CPUC or the Federal Energy Regulatory Commission (including any Competition Transition Charges or Fixed Transition Amount Charges owing to PG&E or its affiliates, as those terms are defined under the California Public Utilities Code). Fixed Transition Amount Charges are also referred to as Trust Transfer Amount (TTA) Charges.

B. Contact Persons (Section 13.3):

1. Billing Services

PG&E Contact:
ESP Billing 415/972-5825

ESP
Contact: _____

2. Metering and Meter Reading Services

PG&E Contact:
ESP Metering Event Group 415/972-5363

ESP
Contact: _____

C. Parties' Representatives (Section 15.1):

PG&E Representative:

Manager of Account Services

Account Services Department

Mail Code H 28 B

P.O. Box 770000

San Francisco, CA 94177

ESP Representative: _____

Contact Name _____

Business Address _____
